

BETWEEN :

Ottawa
1966
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Oct 11
Oct 17

HERMAN E. GAMACHEPETITIONER;

AND

D. R. JONES and J. A. MAHEUXRESPONDENTS.

Practice and Procedure—Mandamus—Demotion of pilot by Quebec Pilotage Authority—Demand for reinstatement—Refusal of—Mandamus procedure in Quebec—Whether applicable in Exchequer Court—Exchequer Court Rules 2(b), 6(3).

Gamache, a licensed class A pilot in the Quebec Pilotage District, was demoted to class B by the Quebec Pilotage Authority purporting to act under s. 24(5) of the Quebec Pilotage District general by-laws, P.C. 19C0-756 Following refusal of his demand for reinstatement he applied to the Exchequer Court for a writ of *mandamus* ordering respondents, the Superintendent of Pilotage and the local Supervisor of Pilots, to reinstate him on the ground that the decision to demote him was made without the petitioner having been called or heard Exchequer Court Rule 2(b) provides that in the absence of specific provision in a federal statute or the rules of the court the procedure shall be determined by the court by analogy to the procedure for similar proceedings in the courts of that province to which the subject matter most particularly relates. The procedure followed by petitioner was strictly in accordance with the provisions of sections 834, 835 and 844(3) of the Quebec Code of Civil Procedure relating to *mandamus*

Held, while it would appear that the application would be granted if the matter were governed by the Quebec procedure the proceedings in the

Exchequer Court should in accordance with Exchequer Court Rule 6(3) have been initiated by statement of claim, there being nothing about the remedy of *mandamus* that made the question for decision unsuitable for adjudication by the normal procedure by statement of claim, statement of defence, discovery, etc. *Queen v. Leong Ba Chai* [1954] S.C.R. 10; *Exchequer Court Act*, s. 29(c), referred to.

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APPLICATION for *mandamus*.

Raynald Langlois for Petitioner.

NOËL J.:—An application was made to this Court by Herman E. Gamache on Tuesday, October 11, 1966, requesting (1) the issuance of an order permitting the petitioner, a licensed pilot, residing and domiciled in Quebec City, P.Q. to issue a Writ of Mandamus against the respondents, D. R. Jones and J.-A. Maheux, respectively, Superintendent of Pilotage and local Supervisor of Pilots for the Quebec Pilotage District and ordering them to file an appearance in this action within ten days of the service upon them of said Writ and that in default of their so doing, the said action may proceed and judgment may be given in their absence; (2) that respondents be ordered to reclassify petitioner as a Grade "A" Pilot for the Quebec Pilotage District and grant him every right and privilege attending such grade; and (3) that costs be assessed against respondents whatever the issue of the cause.

The statutory provision which gives jurisdiction to this Court in relation to the subject matter of the application is section 29 of the *Exchequer Court Act*, R.S.C. 1952, chapter 98 which reads in part as follows:

29. The Exchequer Court has and possesses concurrent original jurisdiction in Canada

(c) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; . . .

Before considering what is the appropriate procedure in this Court, it will be helpful to consider the remedy known as Mandamus as it has been developed in the province of Quebec as well as in jurisdictions governed by the common law. In such jurisdictions Mandamus is a procedure by which, in a proper case, a court may issue an order commanding a person to perform a duty which is not of a purely private nature and, more particularly, as is alleged in the present case, when a public officer omits, neglects or

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refuses to perform a duty belonging to his office, or an act which by law he is bound to perform (cf. article 844(3) of the *Code of Civil Procedure, Quebec*).

It is clear, I believe, that a Mandamus will not lie to the Crown or a servant of the Crown. There is, however, a distinction to be made between a case when a servant of the Crown is acting as a servant of the Crown and a case where a servant of the Crown, be he a minister or any other employee, has been designated to fulfil a particularly statutory duty affecting the rights of subjects. In the latter type of case, unless the power exercised is purely discretionary (and even in such a case if the discretion should have been, but was not, exercised judicially a Mandamus may still issue; compare *Board of Education of Etobicoke v. High-bury Developments, Ltd.*,¹) a Mandamus may issue in a proper case. This was the basis of the decision in *Queen v. Leong Ba Chai*² where Taschereau J., (as he then was) said:

It has been held several times that when a duty has to be performed by the Crown, the Courts cannot claim any power to command the Crown. (*The Queen v. Lord's Commissioners of the Treasury*, (1872) 7 Q.B. 387 at 394; *Short & Mellor*, *The Practice of the Crown Office*, 2nd ed., 1908, p. 202). This is not the case in the present instance. Other considerations would have to be taken into account if the Immigration Officer were a servant of the Crown acting in his capacity of servant and liable to answer only to the Crown (*The Queen v. Secretary of State*, (1891) 2 Q.B. 326 at 338) but the Immigration Officer has been designated by Statute to fulfil a particular act. He is charged with a public duty which runs in favour of the respondent in whom it created a civil right (*The Minister of Finance v The King*, [1935] S.C.R. 278 at 285). If he refuses to act and discharge that duty he is amenable to the ordinary process of the courts.

It was considered that the functions of the immigration officer in that case were judicial or *quasi judicial* and that it was his duty to consider whether the applicant for admission conformed to the standards laid down in the regulations.

In *Security Export Company v. Hetherington*³ Duff J., as he then was, quoted a passage from the judgment of Brett L.J. (Lord Esher) in the Court of Queen's Bench in *Regina v. Local Government Board*⁴ which reads as follows:

Whenever the Legislature entrusts to any body of persons other than the Superior Courts, the power of imposing an obligation on individuals,

¹ [1958] S.C.R. 196.

² [1954] S.C.R. 10.

³ [1923] S.C.R. 539 at 550.

⁴ 10 Q.B.D. 309.

the Courts ought to exercise as widely as they can the power of controlling those bodies of persons, if they admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.

It is, therefore, necessary to look at each statute, by-law or regulation imposing a duty and determine whether, on the one hand, the Minister or servant of the Crown is exercising a purely administrative function or discretion or forming a policy judgment or whether, on the other hand, he is bound by certain statutory or legal limits and requirements or pre-existing standards set up by statute. In the latter type of case, where he is subjected to such standards or where his authority is specifically limited, he may be subject to Mandamus and becomes a "*persona designata*" performing statutorily imposed duties rather than a servant of the Crown.

The substantive right of the person aggrieved by the refusal of such a *persona designata* to comply with his legal duty after he has been required, by an appropriate demand to do so, is to invoke the process of a court of competent jurisdiction to force him to do his duty. Mandamus is the procedure developed in the province of Quebec and common law courts whereby the person so aggrieved may obtain the implementation of such substantive right.

Under section 29(c) of the *Exchequer Court Act*, this Court has jurisdiction to implement a substantive right. The problem I have to deal with is what is the appropriate procedure in this Court to implement that substantive right.

The procedure followed by the petitioner in requesting the issuance of a Writ of Mandamus here is that in force in the province of Quebec, under articles 834 and 835, and 844, subparagraph (3) of the new Quebec *Code of Civil Procedure*. Under the above articles all extraordinary recourses including Writ of Mandamus can only be exercised with the previous authorization of a judge of the Superior Court obtained upon a motion setting forth the facts justifying the recourse, the allegations of which must be supported by an affidavit. Service is then made by means of a Writ on which must appear, over the signature of the prothonotary the name of the judge who authorized it. The above motion must then be annexed to the Writ to take the place of a declaration and the procedure then follows the ordinary rules, but the suit must be heard and decided by

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preference. Under article 836 of the *Code of Procedure* "a judgment which grants the demand must be served on all parties in the case; failure to comply with the order therein contained, constitutes a contempt of court".

Under rule 2 of the *General Rules and Orders* of this Court, as amended, when any matter arises in any proceedings before this Court which is not otherwise provided for by any provision in any Act of the Parliament of Canada or by the rules of this Court, the practice and procedure shall be determined by the Court for the particular matter by analogy:

- (a) to the other *General Rules and Orders* of the Court, or
- (b) to the practice and procedure in force for similar proceedings in the courts of that province to which the subject matter of the proceedings most particularly relates whichever is, in the opinion of the court, most appropriate in the circumstances.

The procedure contemplated by this latter paragraph, paragraph (b) is the procedure adopted by the applicant in making this application; and this might well have been one which could have been adopted by the Court in the present matter providing, of course, the Court were of the view that the applicant falls within the conditions precedent to the granting of the application.

Rule 2 only applies, however, when any matter arises "which is not otherwise provided for . . . by any general rule . . . of the Court" and rule 6, paragraph 3, of the Rules of this Court provides that "any . . . proceedings in this Court, unless otherwise specially provided for, may be instituted by filing a Statement of Claim, which . . . shall conform to the rules of pleading herein prescribed". If there were something about the very nature of the remedy granted in other courts by the procedure known as Mandamus that made it unsuitable for adjudication by the simple procedure of Statement of Claim, Statement of Defence, discovery and hearing provided for by the general rules of this Court, I might have concluded that rule 6 did not cover the matter and that resort must be had to rule 2. On balance I have concluded that there is no such inherent unsuitability and that persons seeking such a remedy may proceed, without any preliminary step, to file and serve a Statement of

Claim. The procedure and practices of the court are sufficiently simple and flexible to enable the parties to seek and obtain any special orders required by the nature of the particular case in order to ensure that the matter proceeds with sufficient speed and within such bounds as may be necessary to ensure that justice is done without undue delay and that public interest is protected¹. If experience in this or any other case appears to demonstrate that special procedure is required for this type of case, amendments to the Court's General Rules will, of course, be considered.

In the present instance the authority under which the petitioner was demoted from Class "A" pilot to Class "B" pilot is subsection (5) of section 24 of the general by-laws of the Quebec Pilotage District, P.C. 1960-756, passed pursuant to section 329 of the *Canada Shipping Act* which reads as follows:

24. ...

- (5) Every grade A pilot who, in the opinion of the authority, is incompetent or unsuitable, may be reclassified as grade B pilot by the authority.

The allegations of the petition show that the above decision was arrived at without the petitioner having been called or heard and it may well be that the above decision was not arrived at judicially. It also appears on a superficial consideration that such a decision is not made under a discretionary or policy authority, but must be reached after a proper appreciation of the facts upon which a decision as to the petitioner's incompetence or unsuitability is based. In arriving at such a decision the Pilotage Authority may well have acted outside its jurisdiction if it, for example, considered extraneous matters (compare *Smith and Rhuland v. The Queen*²).

The question will also arise as to whether a clear demand has been made for the fulfilment of the duty in question.

¹ Rule 155C—Directions as to Conduct of Action

The Court may, upon the application of any party or of its own motion, after giving every party a reasonable opportunity to be heard with regard thereto, at any stage of an action, prior to its having been set down for trial or to an order having been made fixing a date and place for the trial thereof, give directions as to the future course of the action, which directions shall, subject to being varied or revoked by subsequent order of the Court, govern the conduct of the action notwithstanding any provision in these Rules to the contrary.

² [1953] S C.R. 95

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Such a demand appears to have been made by the petitioner's solicitor when he wrote to one of the respondents, D. R. Jones, on August 15, 1966, on behalf of the petitioner. The letter of the superintendent dated September 8, 1966, appears also to be a clear refusal to reinstate the petitioner and the present application appears to be to obtain what he alleges he is entitled to and what the respondents have refused to give him.

It would appear, therefore, that if this matter were governed by the procedure in the new *Code of Civil Procedure for Quebec*, the application would be granted. In view of my conclusion, however, as to the procedure that governs in this Court, no order is necessary. The applicant may proceed by way of Statement of Claim under the *General Rules and Orders* of this Court and the action, if so instituted, will proceed under the rules in the same way as any other action in the Court, subject to any special order that may be sought and granted having regard to the special nature of the relief sought.